

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK NASRAT KALLABAT,

Defendant-Appellant.

UNPUBLISHED

August 28, 2007

No. 270409

Wayne Circuit Court

LC No. 05-011578

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of assault with a dangerous weapon (felonious assault), MCL 750.82, one count of intentional discharge of a firearm at a dwelling or an occupied structure, MCL 750.234b, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 23 months to 4 years' imprisonment for each felonious assault conviction and for the discharge of a firearm conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied his right to due process and a fair trial by the trial court's prejudicial and biased comments during trial. We disagree.

Because defendant failed to object to the comments during trial, this Court reviews the issue for plain error affecting substantial rights. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006). To avoid forfeiture under the plain error rule, a defendant must show that: (1) there was an error; (2) the error was plain, i.e., clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is then warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

"The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantees a defendant the right to a fair and impartial trial." *Conley*, *supra* at 307. The *Conley* Court discussed fair trials in the context of alleged judicial impartiality:

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*Conley, supra* at 307-308, quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (internal quotations and citations omitted).]

We conclude that the trial court's comments to defense counsel during the cross-examination of Tawny Loveless did not deny defendant a fair and impartial trial. A review of the transcript shows that defense counsel was merely eliciting the same testimony from Loveless during cross-examination that was obtained during the prosecution's direct examination, and was not directly attacking her testimony or obtaining new evidence. A trial court has broad discretion to control court proceedings, *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), including avoiding the "needless consumption of time" during the examination of a witness and making "the interrogation and presentation effective for the ascertainment of the truth." MRE 611(a). The trial court's directives to defense counsel were within the bounds of judicial discretion. Furthermore, partiality is not established by a trial court's expression of impatience, dissatisfaction, annoyance, or even anger, which are within the bounds of what imperfect men and women sometimes display. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Thus, defendant has failed to establish plain error.

Defendant also contends that the trial court denied him a fair trial when it questioned defendant regarding his alibi defense following the prosecution's cross-examination of defendant. Before trial, defendant submitted a notice of alibi defense indicating that he was at Ali Yousef's house at the time of the shootings. However, at trial, it became apparent through the testimony of defendant and defendant's witnesses that he was allegedly at the hospital at the time of the shooting. The prosecutor used the notice of alibi defense to impeach defendant on this point during cross-examination. During the prosecutor's examination, the trial court questioned defendant as follows:

Q. Okay. And you don't remember telling your defense attorney that you [were at Yousef's] house; do you? That's what you're saying here now?

A. I don't know how long it was. I never – no.

The Court: You don't know what?

A. I don't remember telling him that.

The Court: You don't remember telling him that. Could you have told him that?

A. I don't know-probably.

The Court: Probably. Were you at [Yousef's] house at the time of the shooting?

A. No.

The Court: Why would you have told your lawyer that if you weren't there?

A. I don't think I ever told him that.

The Court: You just said you probably told him that. You just told me that two answers ago.

A. I don't remember telling him that.

The Court: Oh, you don't remember telling him that.

A. Uh-huh.

The Court: All right. Let me try this again. Could you have told him that?

A. No.

The Court: You couldn't have told him that.

A. Because I never was there.

We conclude that the trial court's examination of defendant did not deny him a fair and impartial trial. A trial court may question a witness in order to clarify testimony, *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992), and the trial court was merely attempting to clarify defendant's testimony regarding his alibi defense, i.e., whether defendant was at Yousef's house at the time of the shootings.¹ Accordingly, defendant's claim of error is without merit. Moreover, defendant has also failed to establish plain error in light of the overwhelming evidence offered by the prosecutor, including the eyewitness testimony of Janelle Pomgracz and defendant's written confession.

We also reject defendant's argument that the trial court erred in denying his motion for a mistrial based on the investigating officer's testimony that he "believed" defendant's confession. This Court reviews a trial court's decision denying a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) (citations omitted).

¹ Contrary to defendant's assertion on appeal, the trial court's examination did not elicit additional factual support to weaken defendant's alibi defense.

“A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant’s ability to get a fair trial.” *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Further, not every mention of some inappropriate subject matter before a jury warrants a mistrial. See *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant specifically contends that the following testimony from Detective Borisch during direct examination warranted a mistrial:

Q. During your conversation with him [defendant] did you ask him questions or did you just let him freely talk?

A. Mostly I asked him questions.

Q. And based upon your conversation did you come to a determination as to whether Mr. Kallabat committed the shooting at 2501 Eardman Court?

A. I concluded that he did. He said he did; I believed him.

After the foregoing testimony, the trial court gave the following instruction:

Ladies and gentlemen of the jury, let me give you a cautionary instruction here. I think about half a dozen answers and questions back detective Borisch said words to the effect I believed him when speaking about Mr. Kallabat’s statement confessing to the crime. One of our rules of engagement here in trials is that one witness cannot vouch for the credibility of another witness. One witness can’t say I believe that witness. Nor any other witness can say they believe another witness. Ordinarily that would be not [sic] permitted and I’m going to order that that portion of detective Borisch’s answer be stricken and ask you to disregard it. Just the part where he said he believed Mr. Kallabat.

We conclude that the trial court properly denied defendant’s motion for a mistrial. Generally, matters of credibility are to be determined by the trier of fact, and it is improper for a witness to comment or provide an opinion on the credibility of another witness. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). Police officers have the duty to avoid improper comments during trial. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). Thus, under the circumstances of the present case, Borisch’s comment that he “believed” defendant when he confessed to the shooting was improper. However, the comment by Borisch was relatively brief and was made in the context of his description of the ongoing investigation of the shooting. Furthermore, the trial court gave the jury a cautionary instruction during Borisch’s testimony, indicating that, “It’s up to you to decide whether or not Mr. Kallabat gave a truthful statement.” Jurors are presumed to follow the trial court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In light of the trial court’s instruction to the jury, the trial court’s denial of defendant’s motion for a mistrial was not an abuse of discretion.

Defendant next argues that he was denied his constitutional rights when the trial court sentenced him based on evidence that was not proven to the jury beyond a reasonable doubt in violation of the United States Supreme Court’s holding in *Blakely v Washington*, 542 US 296;

124 S Ct 2531; 159 L Ed 2d 403 (2004). Specifically, defendant contends that had the trial court refrained from assessing ten points for PRV 6 based on facts not proven to the jury, defendant would have been in an intermediate sanction cell pursuant to MCL 769.34(4)(a). This Court reviews a constitutional challenge to the guidelines scoring, and the proper application and interpretation of the statutory sentencing guidelines, de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

As defendant notes on appeal, our Supreme Court has held that Michigan's sentencing scheme does not offend the Sixth Amendment and that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006). Although defendant urges this Court not to follow the *Drohan* decision, we are bound by an opinion of the Supreme Court under the rule of stare decisis. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). Thus, "[a]s long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Drohan, supra* at 164. "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Both parties cite *People v McCuller ("McCuller I")*, 475 Mich 176; 715 NW2d 798 (2006), which was recently² vacated by the United States Supreme Court in *McCuller v Michigan ("McCuller II")*, ___ US ___, 127 S Ct 1247; 167 L Ed 2d 62 (2007) and remanded for further consideration in light of *Cunningham v California*, ___ US ___, 127 S Ct 856; 166 L Ed 2d 856 (2007).

In *McCuller I*, the defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court calculated the defendant's minimum sentence guidelines range that "provided for a term of five to 28 months' imprisonment, thus placing [the] defendant in a so-called 'straddle cell.'" *McCuller I, supra* at 178. Absent the scoring of certain OV's by the trial court, the defendant would have been placed in a cell where the guidelines would require imposition of an intermediate sanction pursuant to MCL 769.34(4)(a). *Id.* at 179. On appeal to our Supreme Court, the defendant argued that the trial court violated *Blakely* "by engaging in judicial fact-finding to score the offense variables, thereby allegedly increasing his maximum sentence from an intermediate sanction to a prison term." *Id.* Our Supreme Court noted:

MCL 777.21 explicitly requires the court to consider the OV's, the PRV's, and the offense class to determine a defendant's recommended minimum guidelines range. Under our statutory scheme, a defendant has no legal right to have the minimum sentence calculated using only a fraction of the statutorily enumerated factors. Thus, under MCL 769.34(4)(a), a defendant is not legally

² The United States Supreme Court vacated *McCuller I* after the parties filed their respective briefs in the present appeal.

entitled to an intermediate sanction until *after* the OV's have been scored and those OV's, in conjunction with the PRV's and the offense class, indicate that the upper limit of the defendant's guidelines range is 18 months or less. In other words, a defendant's legal right to an intermediate sanction arises from properly scored guidelines, including the scoring of the OV's. A sentencing court does not violate *Blakely* and its progeny by engaging in judicial fact-finding to score the OV's to calculate the minimum recommended sentencing guidelines range, even when the defendant's PRV score alone would have placed the defendant in an intermediate sanction cell. [*McCuller I, supra* at 181-182 (internal footnotes omitted; emphasis in original).]

Thus, the trial court could properly consider facts not found by a jury in determining whether defendant qualified for an intermediate sanction and "it did not violate *Blakely* by scoring the OV's before imposing a prison sentence within the guidelines." *Id.* at 182.

In *Cunningham*, the defendant was convicted of sexual abuse of a child, which is punishable under the California's determinate sentencing law ("DSL") by "a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years." The trial court found multiple aggravating factors by a preponderance of the evidence at sentencing and sentenced defendant to 16 years' imprisonment. *Id.* at 861. The *Cunningham* Court discussed the DSL, noting that "[t]he statute defining the offense prescribes three precise terms of imprisonment—a lower, middle, and upper term sentence" and that the DSL required that "[t]he middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." *Id.* at 861-862 (citations omitted). The United States Supreme Court held that the middle term was the applicable statutory maximum and found that

because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, the DSL violates *Apprendi's*³ bright-line rule: Except for a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. [*Cunningham, supra* at 868.]

Recently, this Court addressed the effect of *Cunningham* on Michigan's indeterminate sentencing scheme:

The system at issue in *Cunningham* is distinguishable from Michigan's sentencing scheme. As already noted, the maximum sentence under Michigan's sentencing scheme is the maximum sentence provided under the statute that defines the offense, 'except as provided in this chapter.' MCL 769.8. Thus, the

³ *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

maximum sentence provided in the statute proscribing the offense is the maximum sentence authorized by the jury's verdict unless and until another statutory provision applies. As discussed below, we conclude that MCL 769.34(4)(a) establishes a new maximum sentence when it applies. *However, because the application of MCL 769.34(4)(a) is contingent, it is not the relevant statutory maximum until the contingency is satisfied. As such, a trial court may properly consider facts not found by the jury in determining whether a particular defendant is entitled to the benefits conferred by MCL 769.34(4)(a).* [*People v Uphaus*, slip op at 6 (emphasis added).]

See, also, *People v Harper*, ___ Mich ___, ___; ___ NW2d ___ (2007) (rel'd July 26, 2007).

In the present case, under MCL 777.56(1)(a), a defendant should be assessed ten points if “the offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony.” A review of the Presentence Investigation Report (PSIR) shows that defendant was on bond at the time of the instant offenses. Therefore, pursuant to *Uphaus, supra*, slip op at 6, the trial court could properly assess ten points for PRV 6 based on the information contained in the PSIR even though it was not proven to a jury beyond a reasonable doubt. Further, the contingent statutory maximum contained in MCL 769.34(4)(a) was not applicable. Thus, pursuant to MCL 769.34(4)(c), the trial court could sentence defendant to either: (1) the properly calculated minimum sentence range (which, in the present case was 10 to 23 months); or (2) an intermediate sanction that may include a term of imprisonment of not more than 12 months. Accordingly, the trial court properly sentenced defendant to 23 months to four years’ imprisonment for each of the felonious assault charges .

In his Standard Four brief on appeal, defendant argues that the prosecutor denied him a fair trial by knowingly presenting false testimony. We disagree.

Generally, to preserve an issue of prosecutorial misconduct, a defendant must object below to the alleged prosecutorial impropriety. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Here, defendant failed to object below. Therefore, we review the unpreserved issue for plain error affecting defendant’s substantial rights. *Carines, supra* at 763.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutors have a constitutional duty not to knowingly use false testimony to obtain a conviction, and must correct false evidence when it appears. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). When a prosecutor knowingly presents false testimony, it may constitute grounds for reversal of a defendant’s convictions. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). However, the mere fact that a witness’s testimony conflicts with earlier statements does not establish that a prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). In *Parker*, this Court rejected the defendant’s claim that a prosecutor knowingly presented perjured testimony where witnesses gave testimony that conflicted with earlier statements, but there was no evidence that the prosecutor attempted to keep the earlier statements from the defendant. *Id.*

In the present case, defendant's main contention in his standard four brief centers around the fact that Pomgracz was the sole witness at trial to identify defendant's silver Durango as the vehicle leaving Eardman Court immediately after the shooting and that Pomgracz had failed to testify to the same at the preliminary examination. A review of the lower court record shows that Pomgracz was the sole witness at trial to identify defendant's silver Durango at the scene of the shooting. However, the prosecutor elicited testimony during her direct examination of Pomgracz that informed the jury why she failed to identify defendant's vehicle at the preliminary examination, i.e., because no one asked her if she saw defendant's vehicle, only if she saw defendant. Additionally, defense counsel cross-examined Pomgracz on the same issue. There is no indication that the prosecutor knowingly used false testimony to obtain the convictions. *Lester, supra* at 276. Moreover, as defendant concedes on appeal, he was provided with all of the witnesses' statements before trial and he had access to the preliminary examination transcript. Finally, the mere fact that Pomgracz's testimony conflicted with her earlier preliminary examination testimony does not establish that the prosecutor in the present case knowingly presented perjured testimony. *Parker, supra* at 690. Accordingly, we conclude that defendant has failed to establish plain error.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray